No. 20-1539

IN THE
Supreme Court of the United States

DANIEL RIVAS-VILLEGAS,

Petitioner,

v.

RAMON CORTESLUNA,

Respondent.

On Petition For Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* CALIFORNIA STATE SHERIFFS' ASSOC., CALIFORNIA POLICE CHIEFS ASSOC., AND CALIFORNIA PEACE OFFICERS' ASSOC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae are the California State Sheriffs' Association ("CSSA"), the California Police Chiefs Association ("CPCA") and the California Peace Officers' Association ("CPOA").[1] CSSA is a non-profit professional organization that represents each of the 58 California Sheriffs. It was formed to allow the sharing of information and resources between sheriffs and departmental personnel in order to allow for the general improvement of law enforcement throughout the State of California. CPCA represents virtually all of the more than 400 municipal chiefs of police in California. CPCA seeks to promote and advance the science and art of police administration and crime prevention, by developing and disseminating professional administrative practices for use in the police profession. It also furthers police cooperation and the exchange of information and experience throughout California. Finally, CPOA represents more than 25,000 peace officers, of all ranks, throughout the State of California. CPOA provides professional development and training for peace officers, and reviews and comments on legislation and other matters impacting law enforcement.

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is comprised of local government enti-

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[1] Pursuant to SUP. CT. R. 37.6, Amici affirm that no counsel for a party authored this Brief in whole or in part and that no person other than Amici, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this Brief. Amici have received consent from all parties to the filing of this Brief.

ties, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court as well as state and federal appellate courts.

Amici have identified this matter as one in which their expertise may be of assistance to the Court and wish to draw the Court's attention to attention to the potentially sweeping officer safety impact of the Ninth Circuit's opinion on local law enforcement agencies.

SUMMARY OF ARGUMENT

Amici are familiar with the Petition filed by Officer Rivas-Villegas and do not seek to duplicate the Petition's arguments. Rather, Amici wish to emphasize the exceptional public importance of the questions presented by the Petition from the perspective of those whose profession brings them in close contact with armed suspects every single day.

Since Amici represent the interests of a wide variety of law enforcement and the local government attorneys who represent them, Amici provide this Court with a valuable perspective into the implications of the Ninth Circuit's Opinion in *Cortesluna v. Leon*, 979 F.3d 645 (9th Cir. 2020). The underlying use of force principles at issue impact important public safety concerns that are critical at all levels of law enforcement. *Cortesluna*, if permitted to stand, will undermine effective law enforcement in nine states, including California and, worse, exponential-

ly increase the danger posed to both officers and the public. In short, the concern of Amici is more global. Given the significant ramifications of the Ninth Circuit's Opinion, Amici respectfully submit this brief in support of Petitioner's Petition for Writ of Certiorari.

In *Cortesluna*, the Ninth Circuit found a reasonable jury could find as excessive force a widely used and minimally intrusive handcuffing technique. In doing so, the court minimized the potential danger to the officers involved at the critical time when Officer Rivas-Villegas very briefly placed his knee on the suspect's back. The court did so by relying entirely on the unsupported assumption that the suspect, who had unequivocally posed a serious threat seconds prior to the use of force in question, had completely ceased to pose a threat once prone on the ground.

Additionally, despite recent Supreme Court decisions emphasizing the crucial role of qualified immunity, the Ninth Circuit defined "clearly established law" at a high level of generality, failed to focus on the specific facts of this case and failed to recognize that Officer Rivas-Villegas' conduct under these specific circumstances had not previously been adjudicated as unconstitutional. In doing so, the Ninth Circuit improperly denied qualified immunity.

Peace officer uses of force have become an issue at the forefront of the National conversation. Amici emphasize that the concerns raised in these headline-grabbing cases are simply not present in the case at hand. This case involves a seven (7) second knee-hold applied to a suspect's back who was known to be armed with a knife in order to facilitate safely handcuffing the suspect. This hold,

where the officer briefly presses his shin across the shoulders or back of a suspect, is frequently taught to police recruits to prevent flight or violent resistance during handcuffing. In short, it is a common, and decidedly minor, use of force.

The circumstances faced by Officer Rivas-Villegas and the other Union City Officers at issue in this case are, unfortunately, also not uncommon. Every day, officers are required to make decisions of incredible magnitude sometimes within minutes or even seconds. It is the duty of a peace officer to investigate crimes and to confront dangerous and armed suspects. Moreover, domestic disturbance calls, like the one at issue here, are amongst the most dangerous for law enforcement. In carrying out this duty, peace officers have various tools at their disposal ranging on the force continuum from deadly force at the top down to tools such as impact weapons, Tasers and chemical agents and down the continuum even further to simple holds and maneuvers which protect officers but are highly unlikely to produce serious injury or death. Many tools employed by officers are specifically designed to buffer an officer from a suspect keeping them some distance from that suspect thereby increasing officer safety.

However, there is one stage of a police encounter that necessarily requires that an officer come in close physical proximity and contact with a suspect – the handcuffing process. Use of a knee to temporarily restrain an individual while handcuffing that individual, a maneuver at the very bottom of the force continuum, is a standard and invaluable tool for law enforcement that greatly reduces potential

for injury to police officers – especially when handcuffing a suspect who is known to be armed.

In sum, the decision below effectively eliminates a widely-practiced tactic and provides law enforcement agencies with no direction as to how to safely take an armed suspect into custody while simultaneously avoiding civil liability. Moreover, denying officers the ability to use the minimal force technique employed in this case will, quite simply, put lives in danger. This Court's review is required in order to provide clear direction as to the reasonableness of officers' actions, particularly when handcuffing a suspect known to be armed, and the applicability of qualified immunity in such circumstances.

ARGUMENT

I. The Ninth Circuit's Decision is Legally Erroneous and Will Put Hundreds of Thousands of Police Officers at Risk of Serious Injury and Death

Peace officers "are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties...." *Christal v. Police Com. of San Francisco*, 33 Cal. App. 2d 564, 567 (Cal. App. 1939). As one court commented, "police officers [exercise] the most awesome and dangerous power that a democratic state possesses with respect to its residents -- the power to use lawful force to arrest and detain them." *Policeman's Benev. Ass'n of N.J. v. Washington Tp.*, 850 F.2d 133, 141 (3rd Cir. 1988). This authority, however, is not without limitations. The law requires

peace officers, while facing extreme danger, to constantly assess the circumstances they face and perform their jobs in a professional and constitutional manner.

There is a limit, however, to what society can ask of its officers. The restrictions placed upon them must allow them to protect their own safety. "We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992).

The Fourth Amendment requires peace officers making an arrest to use only the amount of force that is objectively reasonable considering the circumstances facing them. *Tennessee v. Garner*, 471 U.S. 1, 7-8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). "Not every push or shove, even if it may seem unnecessary in the peace of the judge's chambers. . . violates the Fourth Amendment." *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865; 104 L. Ed. 2d 443 (1989) [citation and quotation marks omitted].

The standard for evaluating uses of force is one of reasonableness requiring "careful attention to the facts and circumstances of each particular case," without the "20/20 vision of hindsight," adopting "the perspective of a reasonable officer on the scene," and making "allowance for the fact that police officers are often forced to make split second judgments – in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97; *Scott v. Harris*, 550 U.S. 372, 383; 127 S. Ct. 1769; 167 L.

Ed. 2d 686 (2007). Whether a specific use of force is reasonable requires a court to balance the nature and quality of the intrusion on an individual's liberty with the countervailing governmental interests at stake. *Graham*, 490 U.S. at 396; *see also Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) That analysis is conducted using a three-step inquiry.

First, the gravity of the particular intrusion on Fourth Amendment interests is assessed by evaluating the type and amount of force used. *See Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1994). Second, the importance of the government interests is considered by evaluating: "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." *Smith*, 394 F.3d at 701, quoting *Graham*, 490 U.S. at 396. "[T]he most important single element of the three specified [*Graham*] factors [is]: whether the suspect poses an immediate threat to the safety of the officers or others." *Smith*, 394 F.3d at 702 [internal quotations and citation omitted]. Third, the gravity of the intrusion on the alleged victim's liberty is balanced against the government's need for that intrusion. *Miller*, 340 F.3d at 964. These standards provide law enforcement officers appropriate flexibility to make the split-second judgments required of them while balancing suspect's constitutional rights with officer safety.

a. The Nature and Quality of the Intrusion on Cortesluna's Fourth Amendment Interests Was Decidedly Not Significant

The first step in determining the reasonableness of the force used by Officer Rivas-Villegas requires the Court to examine the type and amount of force employed to take Cortesluna safely into custody. While doing so, the Court must keep in mind that police officers "are not required to use the least intrusive degree of force possible," but only must act within a reasonable range of conduct. *Marquez v. City of Phoenix*, 693 F.3d 1167, 1174 (9th Cir. 2012) (quotation omitted).

Here, the Ninth Circuit focused significant attention on its conclusion that an injury allegedly had occurred, thus concluding that the intrusion on Cortesluna's Fourth Amendment interest was significant. Amici wholeheartedly agree with the Petitioner that the record is devoid of evidence establishing that Cortesluna had, in fact, sustained any injury at all.

Even assuming Cortesluna sustained the minor back injury alleged, the record does not demonstrate that Cortesluna suffered an injury resulting from a use of force that any circuit case previously has found to be excessive. Indeed, the force that Officer Rivas-Villegas used against Cortesluna is different than most excessive force cases with respect to both type and amount of force used.

Moreover, the way in which Officer Rivas-Villegas manually restrained Cortesluna is vastly different from incidents that the Ninth Circuit has found excessive force. *See*, e.g., *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056

(9th Cir. 2003) [finding that officers applying their weight to a suspect's neck and torso while he lay handcuffed on the ground was "severe and . . . capable of causing death or serious injury."]; *Davis v. City of Las Vegas*, 478 F.3d 1048, 1055 (9th Cir. 2007) [deeming an officer's conduct "extremely severe," when he slammed a handcuffed suspect head-first into a wall, pressed his knee into his back, and punched him in the face). In contrast to these examples, Officer Rivas-Villegas used extremely minimal force in arresting Cortesluna.

b. The Brief Knee Control Hold Used by Officer Rivas-Villegas Is a Standard Handcuffing Technique Necessary to Protect Officer Safety

One of the most important factors in this case is the issue of officer safety, which is not a theoretical concern. The Federal Bureau of Investigation collected data from nearly 12,000 law enforcement agencies in the country employing 546,247 officers in 2018.[2] According to that report, 58,866 police officers reported they were assaulted while performing their duties in 2018.[3] When that number is compounded over a decade, the data provided by the FBI is staggering: the number of assaults against officers from 2009 – 2018 totaled

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[2] U.S. Department of Justice Federal Bureau of Investigation, Uniform Crime Report, 2018 Law Enforcement Officers Killed & Assaulted (2018), available at: https://ucr.fbi.gov/leoka/2018/topic-pages/officers-assaulted.pdf

[3] *Id.*

552,222.[4] In that same ten year period, nearly 10,000 officers were assaulted with a knife or other cutting instrument.[5]

Officers also unfortunately lose their lives in the line of duty. 55 law enforcement officers died from felonious incidents in 2018 and 510 were feloniously killed from 2009-2018.[6]

Just as important in the context of this case as the number of injured officers is how they are injured. In 2018, 16.5% of injuries occurred during an attempted arrest and 12.4% occurred while officers were handling, transporting, or maintaining custody of prisoners.[7]

These statistics underscore what is readily apparent: police officers have incredibly dangerous jobs, which require them to put their lives at risk on a daily basis. The Ninth Circuit's decision undermines officer safety by taking away an important tool designed to prevent officer injury and death through minimal use of force against a suspect.

California has developed statewide training standards for arrest and control of suspects. The California Department of Justice created the Commission on Police Officer Standards and Training ("POST"). Cal. Penal Code §§ 13500 et seq.

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[4] *Id.* at Table 85, available at: https://ucr.fbi.gov/leoka/2018/topic-pages/tables/table-85.xls

[5] *Id.*

[6] *Id.* at Table 1, available at: https://ucr.fbi.gov/leoka/2018/topic-pages/tables/table-1.xls

[7] *Id.*

These standards of training balance the need for officer safety with the need for objectively reasonable actions to safeguard a suspect's constitutional rights.

Control holds, like the one briefly used by Officer Rivas-Villegas, are absolutely necessary for officer safety. "A control hold is a method for physically controlling a subject by manually applying pressure to a particular part of the body until the peace officer has control over the subject."[8] [emphasis in original] Though the standards make clear that "[t]he primary objective of a control hold is to gain control of a subject using objectively reasonable force." *Id.*

POST warns officers that "[w]hen using control holds…, peace officers must be constantly aware that they are close to the subject and therefore vulnerable to attack."[9] This concern obviously increases exponentially when the subject is known to be armed. Further, "[i]f the subject resists or does not respond to the control hold, the peace officer may apply additional force or other force options, which cause the suspect to comply."[10] Additionally, POST advises officers that "[t]he application of a restraint device (i.e. handcuffs…) on a subject can be a difficult and potentially dangerous task for a peace officer."[11] Each and every one of

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[8] California Commission on Peace Officer Standards and Training, Learning Domain 33: Arrest and Control (Version 5.0; Chapter 3: Control Holds and Takedown Techniques) (CSSA et al. Appendix App. 1–App. 7) (July 2020).

[9] *Id.* at App. 5.

[10] *Id.* at App. 6.

[11] California Commission on Peace Officer Standards and Training, Learning Domain 33: Arrest and Control (Version

California's nearly 80,000 active peace officers have been trained in these POST standards.[12]

In sum, arrest and control is a skill set that allows a peace officer to use reasonable force to establish and maintain control of a subject. Here, Officer Rivas-Villegas' actions conformed perfectly to the POST standards discussed above. Just in the mere act of handcuffing Cortesluna, Officer Rivas-Villegas was in a vulnerable position. Making Officer Rivas-Villegas' position even more vulnerable was the fact that Cortesluna was known to be armed with a large knife at the time he was taken into custody. Some control hold is absolutely crucial in such a situation to permit Officer Rivas-Villegas to handcuff Cortesluna without providing Cortesluna the opportunity either to buck the officer off or, worse, retrieve the weapon from his pocket.

In keeping with POST standards, Officer Rivas-Villegas employed that control hold for ***only*** that period of time that was necessary to "gain control" of Cortesluna – a mere seven seconds.[13] Officer Rivas-Villegas did not continue the hold or use "additional force or other force options" because the brief hold was all that was necessary to safely take Cortesluna into custody.[14] In short, the control

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5.0; Chapter 4: Restraint Devices (CSSA et al. Appendix App. 8 - App. 10) (July 2020).

12 United States Department of Justice, Federal Bureau of Investigation. (September 2019). *Crime in the United States*, 2019; Police Employment Data, Table 77 available at https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-77

13 *See* California Commission on Peace Officer Standards and Training, Learning Domain 33, supra at App. 1–App. 7.

14 *Id.* at App. 6.

hold and handcuffing process performed by Officer Rivas-Villegas were textbook standard procedures that thousands of officers employ each and every day.

As discussed in greater detail below with regard to qualified immunity, the Ninth Circuit has previously supported Amici's position that the actions of Officer Rivas-Villegas were reasonable, and indeed, standard operating procedures – even for an *unarmed* suspect. Specifically, in *Jackson v. City of Bremerton*, 268 F.3d 646 (9th Cir. 2001), the plaintiff was suspected of a misdemeanor and unarmed. *Jackson*, 268 F.3d at 650. As the plaintiff in *Jackson* was laying down on the ground, the officer "pushed her the rest of the way down…then placed his knee on her back and handcuffed her." *Id.* The Court in *Jackson* found "the nature and quality of the alleged intrusions were minimal" and that the use of force was not excessive, describing them as a "normal handcuffing procedure." *Id.* at 652.

The practical ramifications of the Ninth Circuit's change in direction with the *Cortesluna* decision are staggering. Without the ability to use a knee to briefly control an armed suspect for the purposes of handcuffing, officers are left with almost no option to protect their own safety. In order to handcuff a suspect, an officer must be in close proximity to them. This process not only puts the officer within arms' reach of the suspect, but it also puts the officer's weapon within arms' reach of the suspect. Further, an officer crouched on the ground to handcuff a suspect is in a tactically disadvantaged position and easier for a suspect to knock down. The Ninth Circuit's opinion downplays these potentially

deadly realities facing an officer at the time of handcuffing an armed suspect.

We, as a society, ask officers to put themselves in harm's way in order that we may be safer. The Ninth Circuit's decision in *Cortesluna*, which imposes an impractical tactical standard on officers and departs from established law, must be set aside as it offers essentially no protection for those officers who heed this call to protect society.

c. Officer Rivas-Villegas Was Investigating a Serious Felony

The government's interest in the brief use of force in this case was extremely high. Here, the officers were responding to a 911 call from a 12-year-old girl reporting that Cortesluna had a chainsaw and was trying to hurt her, her mother and her sister. In other words, the officers were investigating an assault with a deadly weapon. Assault with a deadly weapon or by force likely to produce great bodily injury is categorically a "crime of violence" which can be a felony. *See United States v. Valdovinos-Mendez*, 641 F.3d 1031, 1035 (9th Cir. 2011). Moreover, disturbance calls, such as the one Officer Rivas-Villegas was responding to, are by far the most dangerous in terms of officer safety with the threat of an officer being killed or assaulted far higher than other types of calls.[15] It is objectively reasonable that the officers considered Cortesluna a dangerous felony suspect at the time of their

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[15] United States Department of Justice, Federal Bureau of Investigation. (Spring 2018). *2018 Law Enforcement Officers Killed & Assaulted, Table 83*. Available at https://ucr.fbi.gov/leoka/2018/topic-pages/tables/table-83.xls

encounter. Furthermore, when the officers confronted Cortesluna, he was armed with a knife throughout the encounter.

"The government has an undeniable legitimate interest in apprehending criminal suspects, . . . and that interest is even stronger when the criminal is . . . suspected of a felony." *Miller v. Clark Cty.*, 340 F.3d 959, 964 (9th Cir. 2003) [citations omitted]. When dealing with a felony suspect, the "severity of the crime" factor "***strongly favors the government***." *Id.* [emphasis added].

d. Officer Rivas-Villegas Should Not be Required to Assume A Dangerous Situation Had Become Safe Within Mere Seconds

The decision below minimizes the potential danger to the officers at the time of an incident and ignores the realities faced by those officers. Previous Fourth Amendment precedent has always taken those realities into account. "The Constitution is not blind to 'the fact that police officers are often forced to make split-second judgments.'" *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1775 (2015), citing *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014). Nothing in the Fourth Amendment bars an officer from protecting himself. *Sheehan*, 135 S. Ct. at 1775, citing *Plumhoff*, 134 S. Ct. 2012, 2022.

The Ninth Circuit's opinion as to the reasonableness of Officer Rivas-Villegas' use of force rested primarily on its conclusion that "the objective situation altered dramatically after Leon shot Plaintiff twice with beanbag rounds" finding that, at that time, "Plaintiff no longer posed a risk." *Cortesluna*, supra, 979 F.3d at 653. The most

obvious practical problem with the Ninth Circuit's opinion is that it leaves law enforcement officers and agencies with minimal direction as to how to safely handcuff armed suspects without exposure to liability.

Cortesluna was ***still armed*** when Officer Rivas-Villegas used the minimal force of very briefly pinning him with his knee and handcuffing him. Though bean bag rounds had been fired, such rounds are not always effective and certainly should not conclusively require officers to assume that a threat no longer exists, particularly where, as here, the suspect is still standing and continues to pose a threat. Indeed, one study found that use of a bean bag projectile ended a confrontation only 28.6% of the time. Charlie Mesloh, Mark Henych & Ross Wolf, *Less Lethal Weapon Effectiveness, Use of Force, and Suspect & Officer Injuries: A Five-Year Analysis* NCJ Number 224081, Nat'l Inst. of Justice Grant Report (September 2008) at p. 53 and Table 14.[16] Another study found that officers ultimately were forced to use deadly force to resolve at least 7% of the cases where they had fired impact munitions at subjects. Ken Hubbs and David Klinger, *Impact Munitions Data Base of Use and Effects* NCJ Number 204433, Nat'l Inst. of Justice Grant Report (January 2002).[17] In other words, bean bag rounds are not always effective and do not conclusively remove the threat to an officer as the Ninth Circuit assumed.

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[16] Available at https://www.ncjrs.gov/pdffiles1/nij/grants/224081.pdf

[17] Available at https://www.ncjrs.gov/pdffiles1/nij/grants/204433.pdf

The decision below encourages complacency in potentially deadly situations. In short, application of the Ninth Circuit's decision to real world peace officer encounter will lead to dangerous results and encourage an unrealistic practice of approaching and handcuffing armed suspects without any fear of threat as long as some force had been used immediately prior thereto.

Without the Ninth Circuit's assumption that Cortesluna had completely ceased to pose a threat, it is unquestionable that Officer Rivas-Villegas' use of force was objectively reasonable in handcuffing an armed, violent felony suspect. The Ninth Circuit's decision completely fails to recognize that a suspect can go from seemingly compliant in one second to engaging in a violent attack against officers in the next second. This is particularly distressing in this case, where the suspect was armed with a knife easily within his reach if he was not properly restrained. In sum, the Ninth Circuit's decision imposes an impractical force standard that departs from established law and training.

II. The Ninth Circuit's Decision Ignores this Court's Requirement that the Illegality of the Conduct at Issue Must be Clearly Established

Peace officers are presumed to be protected by the doctrine of qualified immunity. *See Gasho v. United States*, 39 F.3d 1420, 1438 (9th Cir. 1994). "To overcome this presumption [of qualified immunity protection], a plaintiff must show that the officer's conduct was 'so egregious that any reasonable person would have recognized a constitutional violation.'" *Id.* [internal citations omitted]. The standard is a demanding one. The

contours of a right must be "sufficiently clear that ***every*** reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 2083 (2011) [emphasis added]. Thus, the standard is not whether clearly established law ***supported*** an officer's actions, rather it is whether an officer's conduct was ***prohibited*** by clearly established law.

Without repeating the arguments and caselaw analysis in the Petition, Amici also wish to stress the importance of qualified immunity and this Court's repeated reversals of Ninth Circuit opinions for failure to properly apply the immunity. *See City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015), *Stanton v. Sims*, 134 S. Ct. 3 (2013); *Wood v. Moss*, 134 S. Ct. 2056 (2014); *Kisela v. Hughes*, 584 U. S., at ___, 138 S. Ct. 1148, 200 L. Ed. 2d 449 (U.S. Apr. 2, 2018); *City of Escondido v. Emmons*, ___ U. S., at ___, 139 S. Ct. 500, 504, 202 L. Ed. 2d 455 (2019) (per curiam). Amici also wish to stress the requirement that a case be identified "where an officer acting ***under similar circumstances***… was held to have violated the Fourth Amendment" and that a case presenting "a unique set of facts and circumstances" should "alone be an important indication" that the conduct did not violate a clearly established right. *White v. Pauly*, 580 U. S. ___, 137 S. Ct. 548 at 552, 196 L. Ed. 2d 463 (January 9, 2017) (per curiam) [emphasis added].

The Ninth Circuit's decision in this case is a prime example of the alleged illegality of an officer's conduct not having been clearly established. First, the case relied upon by the Ninth Circuit, *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000), is distinguishable on every important aspect of

Fourth Amendment analysis as explained by the Petitioner. Second, a different case with facts similar to the matter at hand, *Jackson v. City of Bremerton*, 268 F.3d 646 (9th Cir. 2001) found the nature and quality of a similar intrusion to be permissible force.

a. LaLonde is Too Factually Dissimilar to the Facts of this Case to Form the Basis of a Denial of Qualified Immunity

First, the amount of force used against the Plaintiff in *LaLonde* was markedly more intrusive than that used on Cortesluna. In *LaLonde*, the Plaintiff was pulled by his hair, knocked backwards to the ground, sprayed with pepper spray, followed by the officer "***forcefully*** p[lacing] his knee into LaLonde's back." *LaLonde*, 204 F.3d at 952 [emphasis added]. Here, video footage conclusively demonstrates that Officer Rivas-Villegas did not "forcefully" kneel on Cortesluna's back.[18]

Second, as to the severity of the crime at issue, the officers in *LaLonde* were responding to a noise complaint – a misdemeanor with no allegation of violence. *LaLonde*, 204 F.3d at 951-52. The officers may have additionally had information that the same complaining party had previously made unfounded noise complaints. *Id. LaLonde* is thus wholly dissimilar to this case, where the reporting party stated that Cortesluna was attacking her and her family with a chainsaw. In short, the severity of Cortesluna's alleged actions weighed far more heavily in favor of the government's intrusion than being a mere noisy neighbor, as in. *LaLonde*.

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[18] Video of arrest of Cortesluna at 1:16-1:23. Available at https://cdn.ca9.uscourts.gov/datastore/opinions/media/19-15105-Cortesluna-Videotape.mp4

Finally, *LaLonde* came to the door armed with nothing but a sandwich. *LaLonde*, 204 F.3d at 951. Cortesluna, on the other hand, initially was armed with two deadly weapons, a crowbar and a knife visibly protruding from his pocket.[19] This is not just a distinguishing fact, it is a fact that changes the entire dynamic of the interaction with Cortesluna. A case where an officer is faced with an unarmed suspect is simply incomparable.

Further, prior to being kneed in the back, *LaLonde* had been pepper sprayed. *LaLonde*, 204 F.3d at 952. Though Cortesluna had been struck with bean bag rounds, pepper spray is far more effective at subduing a suspect and ending a confrontation than bean bag rounds based upon empirical studies. For example, in the study discussed above, use of pepper spray successfully ended a confrontation 57.1% of the time whereas bean bag rounds were only 28.6% successful in ending a confrontation. Charlie Mesloh et al., *supra*, at p. 53 and Table 14.

As noted above, the threat posed by a suspect is the single most important element of the *Graham* factors in analyzing excessive force claims. The difference in the threat posed by Cortesluna, as opposed to that present in *LaLonde*, alone requires a finding that the law had not been clearly established at the time Officer Rivas-Villegas used a minimal amount of force in briefly kneeling on an armed suspect's back to handcuff him would constitute excessive force. *See Smith*, 394 F.3d at 702. The facts of these cases are simply too dissimilar to have placed the constitutional question beyond debate as

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[19] *Id.* at minute 1:16-1:23.

required to deny qualified immunity. In sum, *LaLonde* instructs officers they cannot forcefully kneel on the back of a misdemeanant, unarmed, suspect who has already been pepper sprayed. It does not clearly prohibit using a knee to control an armed, felony suspect for handcuffing purposes.

b. The Law Could Not Have Been Clearly Established Because A Case Exists Ratifying Officer Rivas-Villegas' Actions

In addition to *LaLonde* failing to clearly prohibit Officer Rivas-Villegas' actions, qualified immunity should have been granted because *Jackson v. City of Bremerton*, 268 F.3d 646 (9th Cir. 2001) found actions similar to Officer Rivas-Villegas' actions to be constitutionally sound. In *Jackson*, the plaintiff was suspected of a misdemeanor and unarmed. *Jackson*, 268 F.3d at 650. As the plaintiff in *Jackson* was laying down on the ground, the officer "pushed her the rest of the way down…then placed his knee on her back and handcuffed her." *Id*. The Court in *Jackson* found "the nature and quality of the alleged intrusions were minimal" and that the use of force was not excessive, describing them as "normal handcuffing procedure." *Id*. at 652.

The contrasting cases of *Jackson* and *LaLonde* create an ambiguity as to when a "normal handcuffing procedure" becomes excessive force. As discussed above, Cortesluna was suspected of committing a violent felony. Accordingly, the *Jackson* decision, where similar actions were taken against a misdemeanor suspect and found to constitute permissible force, severely undermines the Ninth Circuit's conclusion that the law was clearly established that Officer Rivas-Villegas'

actions were improper. Reading *Jackson* and *LaLonde* together, it cannot be said that every reasonable official would have understood that what Officer Rivas did violated the Fourth Amendment. *See Ashcroft*, *supra*, 563 U.S. at 742.

In sum, the Ninth Circuit's denial of qualified immunity constitutes error in that it wholly fails to focus on the specific facts of the case and failed to recognize that the officer's specific conduct had not previously been adjudicated as unconstitutional. The Ninth Circuit also failed to acknowledge that not only had it not been adjudicated as unconstitutional, but a case existed suggesting the force used constituted reasonable force and a standard handcuffing technique. In short, the Ninth Circuit subjected Officer Rivas-Villegas to potential liability for violating a standard that simply did not exist at the time he arrested Cortesluna. While an erroneous decision is not always grounds for this Court's review, where that decision will put hundreds of thousands of police officers' lives at risk, Amici request that the Court remedy this error.

III. The *Cortesluna* Decision Undermines Effective Law Enforcement by Providing Little to no Guidance Concerning Their Actions

The constitutional conclusion reached by the Ninth Circuit in this case regarding the brief use of force in handcuffing cannot not be formulated in a manner that would be workable for peace officers in the field. This Court has made it abundantly clear that peace officers require clear rules of straightforward application that they can feasibly

and fairly apply under the stressful conditions of day-to-day policing.

In the context of the Fourth Amendment, this Court explained in *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860 (1981)

> Fourth Amendment doctrine…is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.' *Belton*, 453 U.S. at 458, *quoting* LaFave, 'Case-by-Case Adjudication' Versus 'Standardized Procedures,' 1974 Sup. Ct. Rev, at 141.

The same logic should hold true here. The constitutional prohibition proposed by the Ninth Circuit is unworkable and poses insurmountable obstacles to legitimate law enforcement actions. As discussed in detail above, the decision goes against the training of hundreds of thousands of officers. The vagueness of the decision's perimeters and expectations placed upon law enforcement fails to come even remotely close to the need for clarity discussed in *Belton*. In this case, two judges on the Ninth Circuit are dictating that a standard police practice taught to hundreds of thousands of law enforcement officers should not be used in gaining

control of an armed suspect. Which begs the question, how would those judges, ensconced in the safety of their chambers, like these officers to detain armed suspects without risking their own safety? In short, the decision below is nearly impossible for officers to employ in practice and does nothing but create confusion and tie the hands of officers who are already facing dangerous challenges posed by attempting to safely take armed suspects into custody every day. *Cortesluna* will continue to have dire practical consequences upon law enforcement that should not be ignored.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Officer Rivas-Villegas' Petition for Writ of Certiorari be granted.

Respectfully submitted,

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No. 20-1539

IN THE

Supreme Court of the United States

DANIEL RIVAS-VILLEGAS,

Petitioner,

v.

RAMON CORTESLUNA,

Respondent.

On Petition For Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

APPENDIX

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EXHIBIT 1

California Commission on Peace Officer Standards
and Training Learning
Domain 33: Arrest and Control
Chapter 3: Control Holds and Takedown Techniques

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Use of Control Holds and Takedowns

Introduction	The primary objective of the application of control holds and takedowns is to gain control of a subject. Peace officers must be prepared to use physical force to overcome resistance and gain control of a subject.
Spectrumof force options	Basic use of force philosophy defines th degree or amount of force which may b reasonable to overcome resistance. Onc control is obtained, the degree of force used should be reevaluated.
Ethics	It is illegal and immoral for peace officers to use their authority and position to punish anyone. When peace officers become law breakers by engaging inacts of “street justice” they lose public trust and support. Also, the peace officers subject themselves and their agency to substantial liability.

Officer vulnerability When using control holds and takedowns, peace officers must be constantlyaware that they are close to the subject and therefore vulnerable to attack.

Use of Control Holds and Takedowns, continued

Objectively reasonable force The primary goal of using force is to gain control of a subject. Peace officerconsiderations for using reasonable force include, but are not limited to, the:

- immediate threat to the safety of peace officers or others
- active resistance or attempt to flee
- severity of the crime at issue
- tense, uncertain and rapidly evolving circumstances
- subject's display of aggressive or assaultive behavior
- physical size of the subject (compared to the peace officer)
- need for immediate control of the subject due to tactical considerations
- peace officer's perception of the subject's knowledge of the martial arts orother skills
- inability to control a subject by other means

Application of force

If the subject resists or does not respond to the control hold, the peace officer may apply additional force or other force options, which cause the subject to comply. Once control is achieved, the force applied should be reevaluated.

NOTE: Subjects under the influence of drugs or alcohol may not comply immediately to physical force.

Control Holds

Definition

A **control hold** is a method for physically controlling a subject by manually applying pressure to a particular part of the body until the peace officer has control over the subject. A joint lock is a specific class of a control hold where the technique involves manipulation of a subject's joints in such a waythat they reach their maximal degree of motion.

Primary objective

The primary objective of a control hold is to gain control of a subject using objectively reasonable force.

Benefits

The proper use of a control hold can help a peace officer:

- effectively control a subject
- guide a subject in a desired direction
- control a subject for searching
- control a subject while handcuffing
- prevent escape

<u>EXHIBIT 2</u>

California Commission on Peace Officer Standards
and Training Learning
Domain 33: Arrest and Control
Chapter 4: Restraint Devices

Chapter 4
Restraint Devices

Overview

Learning need

The application of a restraint device (i.e. handcuffs, plastic flex cuffs, leg restraint devices, full body restraints) on a subject can be a difficult and potentially dangerous task for a peace officer. Peace officers must be proficient in the use of proper methods to ensure their safety and the safety of the subjects.

Learning objectives

The chart below identifies the student learning objectives for this chapter.

After completing study of this chapter, the student will beable to:	Objective ID
• Explain the purpose of using restraint devises on a subject	33.04.07
• Explain potential hazards when using restraint devises on a subject	33.04.08
• Demonstrate the proper application and correct positioning of handcuffs on a subject	33.04.09
• Explain various double-locking mechanisms on handcuffs	33.04.10

• Discuss the responsibilities of the contact and cover officers when handcuffing multiple subjects	33.04.11